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No. 95-1649, No. 95-9075

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

STATE OF KANSAS, Petitioner and Cross Respondent

v.

LEROY HENDRICKS, Respondent and Cross Petitioner

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMICI CURIAE

Seattle-King County Defender Association, Washington Defender Association, National Legal Aid and Defender Association, Minnesota State Public Defender, and California Attorneys for Criminal Justice, In Support of Respondent Hendricks

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INTEREST OF *AMICUS CURIAE*

The Seattle-King County Defender Association provides public defense representation to persons accused of being "sexually violent predators". The Association represented Andre B. Young at his trial in 1991, in his appeal in *In re Young*, 122 W.2d 1, 857 P.d 989(1993), at his retrial in 1993-1994, and in his Habeas Corpus petition which was granted in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash., 1995, Ninth Circuit appeal submission withdrawn pending disposition in this case). The Association has represented every person charged under Revised Code of Washington (RCW) 71.09 (the "predator" law) in King County, and currently represents eight clients under that law in state and federal courts. The law is nearly identical to the Kansas law at issue in this case. The Association was founded in 1969 and is the largest public defender office in Washington.

The Washington Defender Association (WDA) is a state-wide non-profit corporation whose approximately 670 members include most of the organized public defender offices in Washington (17 programs are members) as well as assigned counsel. The WDA, with the assistance of grants from the American Bar Association Bar Information Project, developed the Standards for Public Defense Services (1984, 1989). These Standards have been endorsed by the Washington State Bar Association as providing minimum requirements for providing legal representation to poor persons accused of crimes in Washington. The WDA presented a seminar on representation under the "sexually violent predator" law in October, 1995.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit

membership organization based in Washington, D.C. Founded in 1911, the Association is the only national organization devoted solely to assuring the delivery of high quality legal services to poor people. The Association often appears as an amicus party on issues of broad concern that address the constitutional right to counsel and equal access to and fairness in the justice system. Its national membership includes members of the indigent defense and civil legal service bars, and professionals who provide related services. Many of the nation's public defender organizations, as well as assigned counsel and private criminal defense practitioners, are NLADA members.

The California Attorneys for Criminal Justice is the largest organization of criminal defense lawyers in California and regularly appears as amicus curiae in cases important to the administration of justice. California has a statute similar to the one in Kansas.

The Minnesota State Public Defender supervises a state-wide public defense system of more than 500 attorneys. Each year, approximately 240 Minnesota sex offenders complete their sentences. Under the Minnesota Sexually Dangerous Persons Act and Minnesota Sexual Psychopathic Personality Act, each of these persons is in jeopardy of being confined indeterminately, based on crimes for which they have been convicted and sentenced. The constitutionality of post-punishment sex offender commitment laws is of great interest to Minnesota defenders.

The Amici support the position of the Respondent Mr. Hendricks and the decision of the

Kansas Supreme Court. *In the Matter of Hendricks*, 912 P.d 129, 131 (Kan. 1996), cert. granted, 116 S.Ct. 1540 (1996). The parties have consented to participation by amici.

SUMMARY OF ARGUMENT

The Kansas Sexually Violent Predator Act (K.S.A. 59-29a01 *et. seq.*) and its predecessor law in Washington were designed to extend indefinitely the prison terms of sex offenders who otherwise would be released. By reviewing the legislative history in Washington, one can see the punitive purpose underlying these laws. By examining the implementation of the law in Washington, one can discern the punitive impact of these laws.

In response to public outcry, the Legislatures in both states dramatically increased criminal sentences, but such amendments could not retroactively be applied to prisoners who had been given "short" sentences. Because the target prisoners were not mentally ill and therefore could not be civilly committed, both Legislatures created new "civil commitment" systems which do not require proof of mental illness, which are predicated on criminal acts for which the person already has been punished, which commit the person to a prison, and which delay any recognition of the need for treatment until the completion of the criminal sentence.

The statutes permit a second prosecution based on an offense for which the person already has been convicted and served his sentence. They extend incarceration and penalize offenders more harshly than the law permitted at the time they committed their offenses. The laws violate the protections of the Double Jeopardy and Ex Post Facto provisions of the United

States Constitution. In addition, because they are punitive and are applied to people who are not mentally ill, commitment under the law violates the Substantive Due Process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution. *Foucha v. Louisiana,* 504 U.S. 71 (1992).

The Court in granting habeas corpus relief from commitment under the Washington statute in *Young v. Weston, supra,* 898 F. Supp. 744, 749, noted that "the absence of a mental illness requirement is apparent both in the statutory language and in its legislative history".

Recognizing that sex offenders are not classically mentally ill, the Legislature required only proof of a "mental abnormality" or "personality disorder". No recent overt act was required. "Mental abnormality" is circularly defined to predict future crimes based on the commission of past crimes.

The sexual offense is proven again, not in a confidential proceeding as is the case under Washington's civil commitment law (Involuntary Treatment Act (ITA), RCW 71.05) but in a public trial. Committed offenders are called "predators" not "patients", are confined in a prison and may be shot for attempting to escape. The person may be released only if he proves he is "safe to be at large".

The legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character. *Montana Dept. of Revenue v. Kurth Ranch,* 128 L.Ed. d 767, 777 (1994). The question is whether the sanction, disadvantage or penalty imposed constitutes

punishment. *Austin v. United States,* 125 L.Ed.d 488, 498 (1993).

The legislative history of the Washington, California, and Minnesota "predator" statutes, and the six-year-history of incarceration under the Washington law provide overwhelming evidence that the purpose and effect of these statutes, and their companion Kansas statute, are punitive. Each of the states which enacted laws after Washington used similar language in its statute and in the arguments in favor of passing the laws.

As in Kansas (See Respondent's Brief at 15), persons detained under the Washington statute have been denied constitutionally minimal treatment. The actual implementation of the Washington law, in denying constitutional treatment for six years, shows that the law by its nature is not designed to provide treatment but to provide a basis for preventive detention which otherwise would have no legal foundation.

Nearly four years after the first detainees under the "predator" law entered the Washington "Special Commitment Center," U.S. District Court Judge William Dwyer found following a jury trial that the state had denied constitutionally adequate treatment. *Turay v. Weston,* C91-664WD (June 3, 1994). Order and Injunction, Appendix A. Nearly six years after the implementation of the law, April 2, 1996, Judge Dwyer found that "more remains to be done to achieve full compliance." Order on Renewed Motion, Appendix B.

This Court should uphold the decision of the Kansas Supreme Court in finding the Kansas Act

unconstitutional, and should find that the purpose and effect of the Act are punitive, violating Substantive Due Process, Ex Post Facto, and Double Jeopardy protections of the Fifth and Fourteenth Amendments.

ARGUMENT

I. The Legislative History in Washington, Minnesota, and California Makes Clear The Punitive Purpose of the 'Predator' Law Upon Which Kansas' Act Was Modeled and of Similar Laws in Other States

Washington

Kansas modeled its "predator" law upon Washington's RCW 71.09. *Hendricks, supra*, 912 P.d 129, 131. Washington was the first state to enact such a law and has the longest history of its application.

There is little doubt that the primary motive behind the "Community Protection Act of 1990" and the "Sexually Violent Predator" law was to keep sex offenders in prison. As the District Court noted in *Young v. Weston, supra*, there is substantial evidence that the Washington Legislature intended to extend the confinement of persons sentenced under the older, "lenient", determinate sentencing laws, who could not be committed civilly. Id., at 746, fn. 1, and 750, fn. 3.

After public outcry in Washington over several notorious sexual crimes, the Task Force on Community Protection ("Task Force") was formed to recommend changes in the laws related to sexual offenders. [1] Its

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1 The chairperson of the Task Force was King County

"Final Report" was entitled "an act relating to criminal offenders." Final Report of the Task Force on Community Protection, III-1 (hereinafter "Final Report") (Emphasis supplied.) Appendix K. Concern was expressed over a perceived "gap" in the criminal laws that permitted dangerous sex offenders to be released into the community after completing their prison terms. *Young v. Weston*, at 750, fn. 3.

The Task Force called for lengthened sentences for sexual crimes[2] but struggled with the question of how to continue confinement for those who constitutionally were entitled to freedom at the end of their criminal sentences. In the words of David Boerner, Task Force member and chief drafter of the Statute:

> I had no doubt that if the legislature was to extend the length of sentences previously imposed, the courts would find the legislation unconstitutional. While the members of the Task Force could accept that legal judgment, they could not accept the result.

Boerner, Confronting Violence: In the Act and in the Word, 15 U. Puget Sound L. Rev. 535, 549-50 (1992).

Prosecutor Norm Maleng. On the group were two women whose children had been the victims of vicious sexual assaults. Introductory Letter to Governor Booth Gardner, Final Report of the Task Force on Community Protection (1989).

2 The Legislature accepted these recommendations. See RCW 9.94A.310; -.320; and -.360(17).

(Emphasis supplied.) [3]

As outlined by the Task Force, the law was designed to prevent the release of "known dangerous offenders who are highly likely to commit very serious crimes". Final Report, p. II-20 (1989).

The Task Force's proposed "Community Protection Act" called for a new post-sentence, indefinite "civil commitment" law for a class of sex offenders who soon would be released whom the Task Force chose to label "sexually violent predators." The Task Force subtitled its package "an act relating to criminal offenders." Final Report, III-1 (emphasis added). The Legislature quickly enacted the law with only minor modifications. [4] The Act, including what became RCW

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3 This unwillingness to be bound by constitutional restraints was acknowledged by one of the drafters of the statute, Ida Ballasiotes, a member of the Task Force and now a Washington State Representative, who told ABC News that she knew that the Community Protection Act "flies in the face of the Bill of Rights." ABC TV "Turning Point", September 21, 1994.

4 One senator said he proposed a castration amendment because he thought it had a realistic chance of passing, whereas his alternative proposal -- the death penalty -- did not. See comments of Senator Saling, from Excerpts from Hearing of the Senate Law and Justice Committee , January 9, 1990, Appendix C. See also, Scheingold, et al., The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation, 15 U. Puget Sound L. Rev. 809, 816-18 (1992) (describing the mood of public outrage). Professor La

71.09, et seq., went into effect July 1, 1990.[5]

During legislative hearings, Mr. Boerner testified that despite changes "strengthening and toughening, lengthening sentences", there would still be "gaps remaining" that were "unacceptable in terms of protection of the community."

> [U]p to now, under the criminal law['s] generally accepted principles, one can't impose penalties retroactively. People who are in the system now, in prison, being prosecuted now, must have their sentences and the length of those sentences determined by the law that was in existence at the time of their crime. And so we have a number of people who are under the old law who simply can't be charged under the criminal law.

Senate Committee Hearing, January 10, 1990, (transcribed by Defender Association staff) Appendix D, p. 1 (emphasis added).

Fond wrote: "No politician wants to face a sixty-second political attack on television by his campaign opponent claiming 'he voted against community safety and in favor of sexually violent predators.'" Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control, 15 U. Puget Sound L. Rev. at 655, 706).

5 See generally Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 507 (1992). This volume collects articles from detailing the political climate and process leading to the passage of the Community Protection Act of 1990.

> The Task Force saw its role as closing this "gap": The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?

Final Report, p. II-20. The Task Force emphasized:

"[W]e must have the means to detain sexually violent predators whose confinement is not insured by our current laws." Final Report, IV-7. Having identified the operative "end point" for "state control," i.e. release from prison under the earlier sentencing law, the Task Force looked for a way to fill the "gap" by extending the state's control. Id., II-20-21.

The Task Force noted that the involuntary treatment law allows indefinite commitment, but is "quite restrictive in its definitions." [6] It wrote:

> Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and

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6 Boerner testified: "[the Task Force] did not begin with the intent to create a civil commitment system that would address the problem." Senate Committee Hearing, January 10, 1990, p. 1. The Task Force's "path to civil commitment of sexually violent predators" is described by Boerner in Confronting Violence, at 547-77.

> therefore were not detainable. The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence. The Task Force proposes creating a new civil commitment statute for sexually violent predators.

Final Report, II-21. Boerner elaborated:

> Now [the civil commitment system] was attempted to be applied to [Shriner] and the courts determined that he did not fit the definitions of the existing involuntary commitment law. We don't really challenge that finding based on that legal system. That system was designed to deal with a quite different problem, basically the problem of mental illness, and it's a defined term. Mr. Shriner is not mentally ill as that term is defined. . . .

Senate Law and Justice Committee Hearing, January 10, 1990, p. 1 (emphasis added).[7]

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7 Mr. Shriner was convicted of sexually mutilating a young boy. The boy's mother was appointed to the Task Force. See also Senate testimony: (Boerner: "these individuals are not mentally ill"). This was echoed by other Task Force members, including Maleng, Senate Committee Hearing, January 9, 1990, (contrasting the "classically mentally ill" with the Statute's targets who do not fit the "classic definition of mental illness") and Lucy Berliner, of the Harborview Sexual Assault Center, who testified:

The Law Targets People Who Are Not Mentally Ill

Instead of requiring either a "mental illness" or "mental disorder," the Task Force used the terms "mental abnormality" and "personality disorder." RCW 71.09.020(1). [8] Boerner told the Senate Committee:

> . . . I understand the concern about a definition of what does one mean by mentally abnormal. Now, the personality disorder is a defined term and there is a body behind that. Mental abnormality is not. It's been used before, but the

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> And as everyone has said, it is quite true that sex offenders generally do not suffer from mental illness as we think of it classically like such disorders as schizophrenia, and I think that was precisely for that reason that we proposed an alternative civil commitment process so that we would not be conveying to the community or considering these individuals in the same way.

Senate Committee Hearing, January 10, 1990, p. 9.

8 Justice White warned of the dangers of committing someone for a personality disorder. He said that it would be only a step away from dangerousness courts. He pointed out that the state's rationale, that a person who once committed a crime and now has an antisocial personality that sometimes leads to aggressive conduct can be civilly committed indefinitely, would permit the state to hold indefinitely any insanity acquitee, or for that matter any prisoner who is not mentally ill but who has a personality disorder that may lead to criminal conduct. As Justice White said in language that fits exactly here, "The same would be true of any convicted criminal, even though he has completed his prison term." *Foucha v. Louisiana,* 118 L. Ed d at 450.

> definitions that have been given, provided behind it, simply don't add anything in our judgment. What it means is a condition that is expressed by the prediction, by the fear of what will happen in the future. That's how it was used in the model penal code.... The protections come on the procedural side, not on the definitional side.

State Senator Phil Talmadge queried:

> And frankly, my concern is the use of the term mental or [sic] abnormality is so vague that anybody who's been a sex offender in times past will be deemed to be mentally abnormal and could be pulled up under the net of the bill. I think that's the argument.

Professor Boerner responded:

> That's the argument and I think there's some validity to it. Abnormality is a very broad term.

Senate Committee Hearing, January 10, 1990, p. 7(emphasis added).

The District Court agreed that "mental abnormality" has no clinical meaning and will vary from clinician to clinician. See, *Young v. Weston*, at 750, fn.2.

In its preamble to the statute, the Legislature admitted that the target population was not mentally ill. It said that the target group "do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act..." and that

> **In contrast** to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities.... RCW 71.09.010. (emphasis added) [9]

The Legislature attempted to circumvent the mental illness prerequisite for civil commitment by creating a new status of "mental abnormality", which is an element of the status of "predator" and is circularly defined as a condition which predisposes a person to commit criminal sexual acts. RCW 71.09.020.

The Statute also permits commitment based on "personality disorder", which covers a broad range of people, including most convicted of a crime, and which this Court has held may not be used to commit someone civilly. *Foucha v. Louisiana, supra*.[10]

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9 It added: "The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010.

10 According to the Diagnostic and Statistical Manual IV, "The overall prevalence of Antisocial Personality Disorder in community samples is about 3% in males and about 1% in females. Prevalence estimates within clinical settings have varied from 3% to 30%, depending on the predominant

In a demonstration of the pretense of a mental illness requirement in the statute, the State in *Young* called a psychologist who testified that Mr. Young suffered from "a personality disorder not otherwise specified" and from a "mental abnormality", a "paraphilia not otherwise specified", neither of which alone would support a finding that he is a "predator" but together would allow the psychologist to say that more likely than not Mr. Young would reoffend. *In re Young*, 122 Wn.2d 1, 15-16,71.

The Punishment Imperative of the Law Is Evident in Its Application Only Just Prior to Release From Prison

The Statute authorizes indefinite detention of persons previously charged or convicted of a listed "sexually violent offense," RCW 71.09.020(4), but only just prior to their release from confinement into the community. RCW 71.09.030. Incarceration under this law does not coincidentally follow completion of a criminal sentence. It may not occur before the end of the sentence. As Judge Coughenour noted, the statute has a punishment imperative and is inextricably linked to the traditional goals of punishment. *Young v. Weston*, 898 F. Supp. 744, 753. The law first exacts the maximum possible punishment, despite the fact that any mental disorder which causes crime should be known at the time of sentencing.

The statute prohibits detention of "predators" on

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characteristics of the populations being sampled. Even higher prevalence rates are associated with substance abuse treatment settings and prison or forensic settings." DSM IV, at 648.

the grounds of any state mental facility or regional habilitation center. RCW 71.09.060(3).

If a judge determines that there is probable cause to believe that the person is a "sexually violent predator,"[11] the person is taken under warrant (either from prison or the community) to SCC in Monroe, Washington, a maximum-security Department of Social and Health Services facility located within a Department of Corrections (DOC) prison. The person is subjected to an evaluation. RCW 71.09.040, -.050. Over objection, the accused are detained in jail during trial. [12] RCW 71.09.060(3) permits incarceration in the county

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11 A "sexually violent predator" is: "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." RCW 71.09.020(1).

"Mental abnormality" is defined as: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the safety and health of others." RCW 71.09.020(2). No definition is provided for the term "personality disorder."

"Predatory" means: "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." RCW 71.09.020(3).

[12] See ***Lynch v. Baxley***, 744 F.d 1452 (11th Cir.1984) (use of jails to hold involuntary civil committees violates due process.) The ITA does not authorize jail detention.

jail for up to seven days pending a court hearing. If the State prevails at trial, the person is indefinitely committed to SCC until it is proven that he or she is "safe to be at large." RCW 71.09.060, -090, and -.100.

Under an equal protection analysis, the Washington Supreme Court added a less restrictive alternative requirement to the Statute. *Young,* at 47. The Legislature then amended the law to prohibit consideration of less restrictive alternatives at the probable cause hearing even though such consideration is required under the ITA: "In no event shall the person be released from confinement prior to trial." RCW 71.09.040(4). See, RCW 71.05.240. [13]

The law provides for potentially lifetime incarceration in a maximum security prison for someone who has had one conviction for a sexual offense, at any time, in any state. The law applies only when the accused have completed or nearly completed their entire prison sentence. It is linked to a crime for which the person has been punished. It also may be applied to people found not guilty by insanity who are about to be released because they no longer are insane.

The law creates a new category of sexually violent

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13 A post-*Young* amendment to the release provisions, setting numerous requirements for the committed person to meet, bear out the Legislature's punitive intent. See e.g., RCW 71.09.090-098. These provisions make the possibility of release unlikely. See *Foucha v. Louisiana,* 118 L.Ed.d 437, 470 (1993) (Thomas,J., dissenting) n.10.

predators, a term which conjures up frightening images of animals and suggests a punitive, not a therapeutic approach. By intent and design, the law is punitive.

Minnesota

The legislative history in Minnesota shows that its "predator" law also was intended to extend the criminal incarcerations of convicted sex offenders currently serving criminal sentences which were viewed, in retrospect, as being too short.

The SDP Act was enacted in a Special Session in 1994. Minn.Stat.Ann.Sec.253B, subds. 7a,18b (1996). Following a Minnesota Supreme Court decision overturning a sex offender's commitment, *In re Linehan*,518 N.W. d 609, *pet. for reh. den.*(Minn. 1994), the Attorney General presented a bill to the Legislative Task Force on Sexual Predators. His proposal formed the core of the SDP Act passed by the Legislature. He presented a "three prong approach" to "take every step to assure the public that dangerous sexual psychopaths will not be turned loose on our families, friends and communities." Testimony of Attorney General Hubert Humphrey III Before the Legislative Task Force on Sexual Predators, August 11, 1994 (Appendix E) (hereinafter Attorney General Testimony.)

In proposing a "predator" statute, Mr. Humphrey said: "The question before us today is simple: how do we protect the public from some of the most dangerous criminals in society. " Attorney General Testimony at 1.

> . . .[W]e propose changes in state criminal laws to give prosecutors more tools to keep patterned sex

> offenders and pedophiles locked up longer as criminals to avoid the dilemmas inherent in even the tightest civil commitment policy.

Attorney General Testimony at 2.

The Attorney General wanted "a new commitment standard which we think may apply better to the criminals we are trying to get at." Id., at 3, emphasis added. An Assistant Attorney General who was a member of the Legislative Task Force testified:

> To put it in kind of stark terms, if you have two criminal sentencing systems and under the first one for a particular crime you're sentenced to two years and under the next one you're committed to twenty years, and after the two years society sees a need to civilly commit you because of the danger that you'll pose....there's a very obvious reason to treat person number one different from person number two.

Statement of John Kirwin, August 11, 1994 Hearing of the Legislative Task Force on Sexual Predators. [14]

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14 The statement was transcribed by a research assistant for Professor Eric Janus at the William Mitchell College of Law. The Act specifies that persons committed as Sexually Dangerous Persons are not to be considered "vulnerable adults" for purposes of the protections of the Vulnerable Adult Act, Minn. Stat. S626.557 (Supp. 1994). Persons committed under this law, unlike all other committed or institutionalized persons, are deprived of the protections of

California

The California "Sexually Violent Predators" law, article 4, Division 6, Part 2, Chapter 2, of the Welfare and Institutions Code (Sections 6600 et sec.),[15] uses the same terms as the Washington and Kansas statutes. [16] Article 4 consists of a "judicial commitment" process in which a state prison inmate, who otherwise would be released on parole, is subject to indefinite incarceration in renewable two-year periods in the Department of Mental Health, housed in a secure, locked facility under the jurisdiction of the Department of Corrections.[17]

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that Act.

15 Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

16 (See RCW 71.09.020(1), and Cal. Welf. & Inst. Code, sec. 6600(a).) "Mental abnormality" in the Washington statute is defined exactly the same as the California definition of "diagnosed mental disorder." (See RCW 71.09.020(2), and Cal. Welf. & Inst. Code, sec. 6600(c).) Both statutes apply retroactively to those who were in custody as of the effective date of the act. Both statutes allow the State to initiate the involuntary commitment process only after a person has served their entire criminal sentence. Neither requires the State to show any new criminal conduct since the person's commitment to prison. (See RCW 71.09.025 and 71.09.030, and Cal. Welf. & Inst. Code, sec. 6600 and 6601(a).)

17 U.S. Magistrate John Moulds found that the lack of adequate care for mentally ill prisoners by the Department of Corrections constitutes cruel and unusual punishment because of deliberate indifference on the part of the Department. The ruling affects about 28,000 mentally ill prisoners. (Analysis

A Los Angeles trial court has found the statute "essentially and predominantly penal in nature and that its retroactive application is barred by" ex post facto prohibitions. *People v. Rasmuson, et.al.,* No. ZM 001798 et.seq., Los Angeles Superior Court, June 12, 1996, at 7, Appendix G. The Court wrote:

> ...it is apparent from the legislative history...that the Legislature intended to enact a measure to reach those whose determinate sentences were nearing completion and whose custodial release the Legislature sought to prevent." *Id.,* at 21.[18]

The court emphasized that any treatment is delayed for many years and then occurs in a penal setting, which is counter-therapeutic, and the law "prioritizes incapacitation over treatment and rehabilitation." *Id.,* at 24-25, citing Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predator Statute, 15 Univ. of Puget Sound L. Rev. 597, 614-619 (1992).

California's experience was similar to those in Washington, Kansas, and Minnesota. There was a

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prepared for the April 25, 1995 hearing of the Senate Committee on Criminal Procedure, at p. 9.) Appendix F.

18 Another California court upheld the law but required an evidentiary hearing on probable cause. *People v. Hubbart,* Santa Clara Co. No. 140294. The California Supreme Court remanded a petition for review to the Sixth Appellate District. The Second Appellate District has scheduled a hearing on *Rasmuson.*

perceived gap in the laws:

> Under current law there is no legal authority to detain and treat sexually violent offenders who are likely to commit new offenses because of their mental abnormality and defects. There is no procedure to prevent the release into unsuspecting communities of sexually violent offenders who have completed their prison sentences.

SB 1143 Analysis for Senate Committee on Criminal Procedure, April 25, 1995, p.2., Appendix F.[19]

A host of initiatives and statutes sought to increase criminal penalties in general and punishment for sex crimes in particular.[20] (See, e.g., Penal Code sections 667(b) through (i) and 1170.12, the so-called "Three Strikes And You're Out" initiative; Penal Code

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19 Committee reports are authoritative sources for finding legislative intent. *Zuber v. Allen*, 396 U.S. 168 (1969).

20 The California Director of Corrections intervened in a case involving Christopher Hubbart, who was due to be paroled in 1994. "Immediately afterwards, Hubbart was diagnosed as suffering from severe paraphilia, a catch-all term for sexual disorders that are otherwise undefined. Although Hubbart committed no act of misconduct to violate parole, the CDC revoked his parole for psychiatric treatment the day he was due to be released. In 1995, Governor Wilson singled out Hubbart in his State of the State message and urged the Legislature to enact a statute that would keep him and other prisoners from returning to the community." (See Erickson, "Sexually Violent Predators" (1996) Forum magazine, vol. 23, no. 1, p. 127).

section 667.61 et seq., the one and two strikes sex law providing for a lifetime commitment (Stats. 1994, c. 800 (AB 3191)). To address also prisoners entitled to parole, the Legislature passed the "predator" act. Governor Wilson said when signing the law, "Some of the most dangerous criminals will no longer be released simply because the law is so absurdly lenient." Los Angeles Times, October 11, 1995, A-3.

The establishment of a new "civil commitment" scheme was inconsistent with the repeal of the Mentally Disordered Sexual Offender Act in 1981. (Former Welf. & Inst. Code sections 6300 et seq.)

> . . . the Legislature recognizes and declares that the commission of sex offenses is not in itself the product of mental disease. ... persons convicted of a sex offense after the effective date of this section, who are believed to have a serious, substantial, and treatable mental illness, shall be transferred to a state hospital for treatment under the provisions of Section 2684 of the Penal Code." (Emphasis added.) (Historical Note to section 6300, section 4 of Stats 1981, c. 928, p. 3485.)
>
> Further, the Legislature was advised that
>
> [m]any sexual predators, however, do not have a major mental disorder and are therefore not eligible for the Mentally Disordered Offender Program....they are not appropriate for the civil commitment system...."

Report of Assembly Committee on Public Safety, April 18, 1996, pp.4-5. Appendix H

The delay in treatment stands in stark contrast to the MDO law which specifically requires the Department of Corrections to render treatment while in prison and before MDO proceedings are initiated. (Pen. Code sections 2960, 2962(d)(1).)

Postponement of treatment belies any therapeutic purpose. As the court wrote in *Young v Weston ,supra:*

> The punishment imperative also undermines the State's purported interest in treating violent sexual predators. ... Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. ...The failure of the state to provide treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary rather than primary concern. " (Id., 898 F.Supp. at 753.)

II. The Failure to Provide Constitutionally Required Treatment to People Committed As 'Predators' Demonstrates the Law's Punitive Intent and Violates Substantive Due Process Protections

In Kansas, the director of the "predator" program admitted that it provided "essentially no treatment". J.A. 393. The failure to meet constitutionally minimal treatment requirements is the inevitable consequence of

a law which did not have treatment as a goal, but used treatment as a jurisdictional pretext. Because Washington has used the "predator" law for four years longer than Kansas, its experience provides a window through which to view the Kansas practice. Both states took a similar approach to the "treatment" facility. They hired staff who were not experienced in treating sex offenders and they located the facility within a prison. JA 400, Resp. Br.15; Washington findings discussed *infra*.

Federal and state courts in Washington have found that the Special Commitment Center denies constitutionally required treatment to its inmates. Because the laws in the two states share the same design and purpose, it is logical that Kansas will continue to deny constitutional treatment as Washington has.

> There is a
> . . .constitutional right to receive such individual treatment as will give [an involuntarily committed person] a realistic opportunity to be cured or to improve his or her mental condition. [Citations omitted] Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely'. . .

Wyatt v Stickney (M.D Ala 1971) 325 F.Supp. 781, 784, affd. sub nom *Wyatt v Anderholt* ,503 F.d 1305(5th Cir. 1974) (emphasis added).

U.S. Court Finds Treatment Inadequate

In an "Order and Injunction", the U.S. District

Court found that the Washington SCC treatment staff was not experienced or adequately trained; that treatment plans with objective measures of progress had not been developed; that clinical direction was absent; that the trust necessary to establish therapeutic relationships was missing; that treatment staff had verbally abused and strip searched residents; and that the program had failed "to meet constitutional standards to date." Order and Injunction, Appendix A. [21]

The Court issued its First Supplemental Order in August, 1994, denying the state's request for a 180 day extension to conduct a nationwide survey to determine prevailing professional standards. It noted: "The SCC program has been in operation for four years. Defendants [state] should already know prevailing professional standards." Appendix I, at 3.

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21 The Statute fails to provide transitional programs such as work release. Recent amendments purport to allow conditional release but saddle detainees with the burden of establishing a mechanism for release. RCW 71.09.090-098. Dr. Vernon L. Quinsey, who was commissioned by SCC to critique its program, cited the lack of "any provision for aftercare and community supervision" as "fatal" to any realistic hope for successful therapy. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. at 655, 706. In addition, the Legislature has created a crime of escape for a person released under the Statute to a less restrictive alternative who leaves the state without permission. RCW 9A.76.120. Leaving the state without permission while under a less restrictive alternative under the ITA, RCW 71.05, is not defined as a criminal act.

SCC Conditions SCC More Severe Than those in Prison

A King County, Washington, trial court found that the conditions of confinement under RCW 71.09 and the lack of constitutionally adequate treatment violated substantive due process, but declined to dismiss the petition.[22] Appendix J. A civil commitment scheme violates substantive due process if it imposes a regimen which essentially is identical to that imposed upon felons with no need for psychiatric care. *Allen v. Illinois,* 478 U.S. 364, 373 (1986). In many respects, the conditions at SCC are more severe than those imposed upon incarcerated criminals and than those imposed upon the same detainees when they were in prison under their criminal sentences. See FFA-5, 11, 13, 14, 16, 27, 28; Appendix J, p. 5.

The level of security for those detained under the Statute is high. FFA-2, 3, 4, 5, 6, 7, 11, 12, 14, and 16. SCC is located within a DOC institution. Residents may be shot for attempting to escape. FFA-6. Medical, food, library and visitation services are provided by DOC. FFA-2, 3. DOC guards provide external security and some internal security. FFA-3. When residents leave SCC they are transported in full prison gear including jumpsuits and shackles. FFA-11. They may be strip searched without reasonable suspicion any time they leave the facility, even though under constant armed surveillance while gone. FFA-11. Electronic

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[22] The Findings of Fact and Conclusions of Law and Order issued by Judge Armstrong on 11/7/94 in *In re Campbell*, No. 93-2-15348-1, are attached as Appendix J and referred to hereinafter as "FFA."

audio and visual monitors are in place throughout the facility. FFA-4. The program director had no training or experience in sex offender treatment before being hired by SCC. FFA-23. There are more treatment opportunities for convicted sex offenders in prison than at SCC. FFA-27.

Residents have been verbally abused and subjected to racial epithets. FFA-29. Expert testimony characterized the inconsistent application of rules and policies as cruel. FFA-13. The lack of reasonable opportunity to improve one's "condition" and be released from civil commitment is also cruel.[23]

In *Reno v. Flores*, 123 L. Ed. d 1, 16-17 (1993), this Court analyzed a substantive due process challenge to a regulation concerning the custodial detention of juveniles. Finding no due process violation, the court said: the government did not intend to punish, the conditions were decent and humane, and the detention was not punitive because it was not excessive in relation to the governmental interest. Id., at 17. The "predator" law does intend to punish, the conditions at SCC are not decent and humane, and the detention is excessive and punitive.

Unlike in *Allen v. Illinois, supra,* in which offenders may be released "after the briefest time in

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[23] Confinement for mental illness is cruel and unusual punishment unless accompanied by adequate treatment. Ohlinger v. Watson 652 F. d 775, 778, n.6.(9th Cir. 1981).

confinement", release under the "predator" statutes is not likely because treatment has been unavailable. The Legislature presumed that persons committed were "unamenable" to treatment and would require "very long term" treatment. RCW 71.09.010.

This Court wrote in *Nixon v. Administrator of General Services,* 433 U.S. 425,476 n.40 (1977):

> [P]unishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.

Deprivation of liberty in a maximum security setting in which constitutionally adequate treatment has been denied is punishment. A statutory scheme which legitimizes community condemnation by labeling committees "sexually violent predators," which seeks to obtain the commitment through open court hearings and open court files, and which presumes a lengthy loss of liberty is inconsistent with a real treatment rationale. It is punitive in design, intent, purpose and effect.

"It is the effect, not the form, of the law that determines whether it is ex post facto." *Weaver v. Graham,* 450 U.S. at 31. (Emphasis supplied.) The overall design and effect of the statute must bear out the non-punitive intent. *United States v. Ward,* 448 U.S. 242,248-249 (1980). The intent, design and effect of the Statute prove it to be penal.

CONCLUSION

This law may have been well-intentioned as an

effort to respond to public fear. But it was designed to do something which the Constitution does not permit--extend prison sentences after the fact, and detain people under the guise of civil commitment who are not mentally ill. In the process, it also punishes people twice for the same offense. Professor La Fond wrote: " ...In America, we punish a citizen for what he has done and not for what we think he may do." La Fond, supra, at pp. 702-703.

The Kansas Supreme Court was correct in its ruling and we urge the Court to affirm.

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